

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 25**

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**COMMERCIAL AIR, INC.**  
*Charged Party*

**Case No.: 25-CA-092821  
25-CA-099616  
25-CA-099620  
25-CA-099624  
25-CA-104026**

and

**INDIANA STATE PIPE TRADES  
ASSOCIATION AND U.A.  
LOCAL 440, AFL-CIO**  
*Charging Party*

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**INDIANA STATE PIPE TRADES ASSOCIATION AND U.A. LOCAL 440, AFL-CIO'S  
ANSWER TO RESPONDENT'S CROSS EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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## **I. INTRODUCTION**

On August 29, 2014, the General Counsel and the Indiana State Pipe Trades Association and U.A. Local 440, AFL-CIO (“Petitioner” or “Union”) filed their Exceptions to Administrative Law Judge’s Decision entered on August 1, 2014 (“ALJ Decision”) asserting that the ALJ erred when he concluded that Respondent’s terminations of Chris Lehr (“Lehr”) and Charles Howard (“Howard”) were not violations of Section 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. The General Counsel and the Union further asserted that the ALJ erred when he determined that the record did not support the Charge that Respondent, through its President Tim Gatewood (“Gatewood”), threatened and coerced Lehr on August 17, 2012 in violation of Section 8(a)(1) by telling him that if he ever left the Respondent to go to the Union, he would never be re-hired. On September 12, 2014, the Respondent Commercial Air, Inc. filed its Response and Cross Exceptions.<sup>1</sup> The Petitioner herein submits this Answering Brief to the Respondent’s Cross Exceptions pursuant to Rule 102.46(f)(1) of the National Labor Relations Board (“Board”) Rules and Regulations.

In its Response and Cross Exceptions, the Respondent sets forth two cross exceptions alleging that General Counsel failed to meet its *prima facie* burden of proof with respect to the terminations of Lehr and Howard. Both of these cross-exceptions should be denied in their entirety.

## **II. STATEMENT OF FACTS**

The Respondent is a mechanical services contractor involved in the construction industry. TR 13. The Respondent primarily performs HVAC, plumbing, and pipefitting work. TR 13; TR 20. Tim Gatewood (hereinafter referred to as “Gatewood”) has been the owner and manager of the Respondent since 1981. TR 18-19. At all material times, Gatewood has been a supervisor of

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<sup>1</sup> It should be noted that Section 102.46(j) specifically states that “any brief filed pursuant to Section 102.46 must not be combined with any other brief.” Notwithstanding the language of Section 102.46(j), Respondent submitted a combined Response and Cross Exceptions Brief.

Respondent within the meaning of Section 2(11) of the NLRA. JT Ex. 1. The Petitioner, is a labor organization within the meaning of Section 2(5) of the Act. JT Ex. 1.

In February 2011, Chris Lehr (hereinafter referred to as “Lehr”) began working for the Respondent. TR 107. At the time Lehr interviewed and received the position with the Respondent, he was, and still is a member of the Union. TR 107-109. During Lehr’s interview, Gatewood brought up his union membership because it appeared on Lehr’s resume. TR 81; TR 108-109. During Lehr’s interview Gatewood made several statements regarding Lehr’s union affiliation. Specifically, Gatewood told Lehr that if he ever left him “to go to a union company I will never hire you back.” TR 124. Gatewood stated that guys had “come back on their hands and knees begging for their job back and he just – he couldn’t do it” if they had left for a union job. TR 109. After being offered the job by the Respondent, Lehr accepted and began working as a plumber for the Respondent. TR 110.

In April 2011, the Respondent hired Charles Howard. TR 157. Howard was hired by Gatewood as a welder/fitter, but was also a licensed plumber. TR 156. Howard was a former Union member who had left the Union in February of 2009. TR 158. As he did in Lehr’s interview, Gatewood informed Howard during his interview that if he ever quit and went back to the Union, “he wouldn’t be able to be re-employed by [the Respondent].” TR 158.

In May of 2012, John Kurek (hereinafter referred to as “Kurek”), an organizer for the Union, began a top-down organizing campaign of the Respondent. TR 200. In August of 2012, Kurek asked Lehr to talk to Gatewood and discuss with him the benefits of unionizing. TR 210. Lehr talked to Gatewood at Indianapolis Public Schools 107 (hereinafter referred to as “IPS 107”) in August of 2012. TR 210; TR 304. On August 17, 2012, Lehr told Gatewood that he “had been [with the Respondent] for quite a while and that [he] might need to make a choice as

to where [he] was going to be at – end up at, with the Union or with him.” TR 113. Gatewood responded to Lehr that he had “to do what is right for [his] family” but added that “if you ever leave me and go to a union shop, I will never hire you back.” TR 113. Furthermore, Gatewood told Lehr that he has “had guys on their hands and knees begging for their job back” and he “just can’t do it after they’ve gone to a union job.” TR 113. Following this discussion, Lehr immediately reported to Kurek what Gatewood had said to him. TR 113. The top-down organizing campaign was ultimately unsuccessful. TR 204-205.

In early November 2012, Kurek met with Lehr to “discuss the possibility of doing a bottom-up organizing campaign.” TR 212; TR 124-125. On November 8, 2012, Kurek mailed and faxed a letter to Gatewood informing him that Lehr was a Volunteer Union Organizer for the Petitioner. TR 26; GC Ex. 2. On that same date Petitioner filed a Charge with the NLRB in Case 25-CA-092821, based on the statements made by Gatewood during the August 17, 2012 discussion with Lehr. TR 125; 27-29. The Charge was served on Respondent by regular mail. Respondent received the Charge on November 9, 2012. Respondents Ex. 14.

On November 11, 2012, just a day or two after receiving the NLRB Charge and the volunteer organizer letter, Gatewood called Lehr and told him not to report to work the following day. TR 116-117. On Monday, November 12, 2012, Gatewood met with Lehr and Sean Young (hereinafter referred to as “Young”), the plumbing supervisor, at the Steak and Shake near Lehr’s house. TR 117. During this meeting, Gatewood discussed Lehr’s: (i) alleged excessive phone use while he was working; (ii) some piping that was done at the IPS 107 job; (iii) the way his time was kept at the Grissom Hanger job; and (iv) a comment Lehr allegedly made stating that he hoped he would get laid off. TR 35; TR 117. With regard to the time keeping issues,

Gatewood told Lehr that he did not approve of the way he had been keeping time.<sup>2</sup> TR 117. Lehr informed Gatewood that he was simply arriving at the time that the lead plumber, Dana Wildrick, had instructed him to. TR 118. Gatewood docked Lehr's paycheck for the missed day of work due to the meeting at the Steak and Shake. TR 118. Gatewood never informed Lehr of this suspension, and instead just deducted the pay from his paycheck. TR 118. After Lehr's suspension, his work schedule was changed from four 10 hour shifts to five 8 hour shifts. TR 118.

Lehr returned to work the following day, November 13, 2012, and continued his efforts on the bottom-up organizing effort for the Petitioner. TR 115-116; TR 118-119. At this point, the frequency of the meetings between Lehr and Kurek increased to weekly. TR 212-213. Lehr also began to wear Union shirts and set out Union pamphlets in the company break areas. TR 119.

On November 21, 2012, Gatewood sent a memorandum to all employees of the Respondent stating the "company's position on unions." TR 36; TR 119; GC Ex. 4. The memo was addressed specifically from "Tim Gatewood." GC Ex. 4. In the memo, Gatewood stated "I am not in favor of a union at Commercial Air nor I do not think it would benefit you or the company." GC Ex. 4. Gatewood went on to state "you can't rely on any promises made by a union . . . [t]hey can say anything they want, but they can't guarantee anything." GC Ex. 4. Gatewood also stated in the memo that "there is plenty of work at [the company]." GC Ex. 4.

In the Fall of 2012, Howard began meeting with Lehr and Kurek to discuss organizing the Respondent. TR 159-160. In mid-November 2012, Lehr began wearing shirts with Union

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<sup>2</sup> Lehr testified at the hearing that per a previous agreement with Gatewood, he was working four ten hour shifts at the Grissom Hangar jobsite instead of five eight hour shifts. TR 114. He had recorded his time as 6:00 am to 4:30 pm, although the gates to the jobsite did not actually open until sometime around 6:30 am. TR 115. Lehr explained that he reported his time as instructed by lead plumber Dana Wildrick. TR 118. Wildrick had reported the same times as Lehr. TR 274.

logos to work almost every day. TR 119-20. Lehr also placed Union flyers in the break room and began speaking to other employees about the Union and inviting them to Union meetings. TR 119-20. Lehr also began having meetings with Union Organizer Kurek. TR 119-120. Howard attended the meetings with Union Organizer Kurek. TR 163-164. Howard also wore Union shirts to the jobsite almost everyday. TR 163-64. In January of 2013, Howard began to work at the Grissom Hanger with Lehr and rode to work each day with Lehr. TR 164. Howard attended weekly meetings with Lehr and Kurek to discuss the union organizing activities. TR 164.

On or about February 26, 2013, Howard was terminated by Respondent. TR 328;TR 170. Gatewood testified at the hearing that Howard was terminated for poor work performance. TR 328;TR 170. However, according to Howard's Discharge/Layoff sheet, Howard was let go due to lack of plumbing work. TR 43; GC Ex. 6.

Just a few months prior to his termination, in October of 2012, Gatewood invited Howard on a company sponsored trip to Talladega, Alabama. TR 172. The purpose of this trip was to thank hard working employees for all the hard work they had done for the Respondent. TR 173. Additionally, in December of 2012 Howard was given a \$500.00 bonus at the Christmas party. TR 172. Howard received a larger bonus than several other employees. TR 172. When Gatewood gave Howard his bonus he told him "thank you for the work you have done . . . I'm glad I hired you . . . I'm glad you work for us." TR 172. Despite these comments, Howard was fired for allegedly having poor work performance just a few months later. TR 328.

Around February of 2013, during a meeting with Kurek, Lehr expressed concern about safety issues at the Grissom Hanger worksite. TR 218. Specifically, Lehr was concerned about a truck onsite that did not have breaks, some ground openings that were not properly barricaded,

some standing water, and certain high areas that were not properly barricaded. TR 218. As a result of the safety issues, on February 28, 2013, Kurek filed a complaint with the Occupational Safety and Health Administration (OSHA). TR 221.

That same week, on March 1, 2013, around 2:00 p.m., Young informed Lehr that he was being let go, allegedly due to lack of work. TR 40; TR 122. At the time Lehr was laid off, he was one of two plumbers at the Grissom worksite, the other plumber being Wildrick. TR 122. Wildrick was not laid off. TR 122. In addition, there were two plumbing apprentices, Dave Richardson and Brian Moore. TR 61. Neither of the plumbing apprentices were laid off. TR 61. When Lehr was laid off, Grissom had yet to be completed and twenty to thirty percent of the plumbing work remained. TR 127-128. Less than one week after Lehr was terminated the Respondent rehired another Plumber, Tim Evans (“Evans”), who had been ‘laid off’ one week prior to Lehr. GC Ex. 10; GC EX. 25. Evans remained employed by Respondent until August 2012 when he was terminated for cause, not for lack of plumbing work. TR 56; Stipulation.

### **III. ARGUMENT**

#### **A. Response to Cross Exception 1.**

##### **a. The General Counsel and Petitioners Unquestionably Met Their *Prima Facie* Burden by Showing that Respondent’s Decision to Terminate Lehr was Motivated in Part by Lehr’s Protected Activities.**

Respondent alleges in its Cross Exceptions that the Petitioners failed to meet their *prima facie* burden of showing that Respondent’s termination of Lehr was motivated by Lehr’s protected activities. Respondent’s Cross Exception is without merit as Petitioner’s have clearly met this burden.

To prove that an employee’s discharge violates Section 8(a)(1) and (3) of the Act, the General Counsel must show, by a preponderance of the evidence, that the employee’s protected

activities were a motivating factor in the employer's termination of the employee. *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1318 (7th Cir. 1989). *Manno Electric, Inc.*, 321 NLRB 278, 280-81 (1996). If the General Counsel is able to establish an initial showing of discriminatory motivation, the burden shifts to the employer to demonstrate that it would have taken the same action absent of the protected conduct. *Wright Line*, 251 NLRB 1083, 1089 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

The General Counsel and the Petitioners have clearly met their burden in this matter by demonstrating that Lehr's union activities were the primary motivating factor in Respondent's decision to discharge him. For starters, there is no question that Respondent had knowledge that Lehr was actively engaged in a union organizing campaign. Kurek sent a letter to Respondent on November 8, 2012 identifying Lehr as a volunteer Union organizer. TR 214. Additionally, Lehr testified that he wore union shirts and other attire, distributed union literature in the break-room and spoke to other employees of Respondent about the Union. TR 119-120.

In response to Lehr's organizing efforts, Respondent sent out an anti-Union memo to all of its employees. GC Ex. 4. The ALJ found that Respondent's statements in the Memo that he "oppose[d] unionization", that "it would not be good for you", and that "you can't rely on any promises made by a union", shed light on the Respondent's motivations in disciplining and ultimately terminating Lehr. ALJD 14.

Furthermore, Respondent was openly hostile towards the Union and Lehr's organizing campaign. The ALJ found that Respondent violated Section 8(a)(1), (3) and (4) of the Act when it suspended Lehr on November 12, 2012 in retaliation for engaging in protected union activities. ALJD 15. Respondent did not except to this finding by the ALJ. Furthermore, as the ALJ noted, Gatewood told Howard in his interview that if he ever left the Respondent *for the Union*, he



would never be re-employed. ALJD 3 (emphasis added). In addition, the Respondent made a similar threat to Lehr during his interview and again in August 2012. TR 249.

Finally, there is no question that the timing of Lehr's discharges was highly suspect. Lehr was discharged in the midst of an open Union organizing campaign. Additionally, Lehr was discharged just months after notifying the Respondent of its status as a volunteer union organizer. It is well-settled under Board law that inferences of animus or discriminatory motive may be drawn from suspicious timing. *Tinney Rebar Services*, 354 NLRB 429, 437 (2009).

Accordingly, based on the evidence of Lehr's protected Union activities, the overwhelming evidence of union animus demonstrated by the Respondent, and the suspect timing of the discharge there is very little question that the Petitioners met their initial *prima facie* burden of establishing discriminatory intent in the discharge of Lehr.

B. Response to Cross Exception 2.

a. **General Counsel and Petitioners Met Their *Prima Facie* Burden by Showing that Respondent's Decision to Terminate Howard was Motivated in Part by Discriminatory Intent.**

Respondent also alleges in its Cross Exceptions that the Petitioners failed to meet their *prima facie* burden of showing that Respondent's termination of Howard violated Section 8(a)(1) and (3) of the National Labor Relations Act. For many of the same reasons as set forth above, Respondent's Cross Exception is without merit as Petitioner's have clearly met this burden.

The evidence clearly established that Charles Howard engaged in protected activity and Respondent had knowledge of Howard's protected activity. For starters, Howard openly discussed his previous union affiliation with Gatewood during his interview. TR 158. Additionally, Howard often wore Union paraphernalia to the jobsite. TR 164. He often wore Union t-shirts, had Union stickers on his hard hat and wore a Union jacket with the Union

emblem on the back. TR 164. Moreover, Howard often discussed the benefits of joining the Union with other employees of Respondent. TR 164.

In the Fall of 2012, Howard began meeting with Lehr and Kurek to discuss organizing the Respondent. TR 159-160. In January of 2013, Howard began riding to work each day with Lehr. TR 163. Additionally, Respondent also knew that Howard rode to the job everyday with Lehr, who had already been identified to Respondent as a volunteer Union organizer.<sup>3</sup> TR 168. Thus, the evidence supports the conclusion that Respondent had knowledge of Howard's Union activity and support.

Additionally, there is no question that Respondent was openly hostile towards protected union activity. The ALJ correctly held, and the Respondent does not dispute in its Response Brief and Cross Exceptions, that the Respondent suspended Lehr in violation of 8(a)(3) of the Act a few days after Lehr was declared a volunteer Union organizer. ALJD 13-15. Additionally, following this suspension, the Respondent delivered a memorandum to all employees informing them of the negative characteristics of the Union, stating specifically that the union would not be good for Respondent's employees. ALJD 14. As set forth above, the ALJ found that Gatewood's statements in the Memo that he "oppose[d] unionization" and that "[the union] would not be good for you" shed light on the Respondent's motivations regarding the alleged unlawful actions taken by Gatewood. ALJD 14. Furthermore, Gatewood told Howard in his interview that if he ever left the Respondent for the *Union*, he would never be re-employed. ALJD 3.

Furthermore, similar to Lehr's termination the timing of Howard's discharge was highly suspect. Howard was discharged within a few months of the commencement of a Union

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<sup>3</sup> When Gatewood first threatened to discharge Howard, Gatewood told Howard that he could finish the day because Gatewood knew that Lehr was Howard's ride.

organizing campaign. Additionally, only a few months prior to his termination, Howard was recognized for his work achievements by being invited on a trip with other outstanding employees. TR 172. Moreover, at the Christmas Party in December, Gatewood gave Howard a monetary bonus and told him “I am glad I hired you.”<sup>4</sup> TR 173.

Finally, Gatewood’s testimony that Howard was terminated for poor performance was contrary to Respondent’s Employee Discharge / Layoff Checklist which stated that Howard was terminated due to a “Work slow down / plumbing department labor reduction.” GC Ex. 6; TR 43. As acknowledged by the ALJ, the Board has repeatedly held that when an employer offers inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons being offered are pretexts to mask an unlawful motive. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 2007; *GATX Logistics, Inc.* 323 NLRB 328, 335 (1997) enfd. 160 F.3d 353 (7<sup>th</sup> Cir. 1998).

Accordingly, based on the evidence of Howard’s protected Union activities, the overwhelming evidence of union animus demonstrated by the Respondent, and the suspect timing of the discharge there is very little question that the Petitioners met their initial *prima facie* burden of establishing discriminatory intent in the discharge of Lehr.

#### **IV. CONCLUSION**

Based on the foregoing evidence and legal precedent, the Union respectfully requests that Respondent’s cross-exceptions be denied and that the Board uphold the Judge’s findings that the General Counsel and Petitioner met their *prima facie* burden of proof with respect to the discharges of Chris Lehr and Charles Howard.

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<sup>4</sup> Howard testified that his work habits did not change from the time period when he received a \$500 Christmas bonus and when Gatewood told him that he was glad that he had hired him until the time that he was terminated. TR 173.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The undersigned certified that on today's date, September 26, 2014 he served a copy of the Indiana State Pipe Trades Association and U.A. Local 440 AFL CIO's Answer to Respondent's Cross Exceptions to the Administrative Law Judge's Decision **via electronic mail** to each of the below referenced the Recipients.

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